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No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,

Respondents.

On Writ of Certiorari to the Utah Supreme Court

Brief Of International Mass Retail Association And American Chemistry Council As *Amici Curiae* In Support Of Petitioner

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STATEMENT OF INTEREST*

The International Mass Retail Association ("IMRA") is an alliance of over 800 retailers, producers, and service suppliers who bring products and services to domestic and international consumers. Association members include more than 133,000 stores worldwide and hundreds of supplier companies that employ millions of workers and account for over $1 trillion in annual sales. IMRA works to improve and expand its members' businesses through industry research and education as well as government advocacy, and it encourages its members to establish relationships, solve problems, and work together for the benefit of the consumer and the mass retail industry.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, a $460 billion enterprise and a key element of the nation's economy. Council members apply the science of chemistry to make innovative products and services that make people's lives throughout the country and abroad better, healthier, and safer. The Council is committed to improving environmental, health, and safety performance through Responsible Care®; common sense advocacy designed to address major public policy issues; product testing; and health and environmental research.

One issue in this case is whether a jury in one State may regulate conduct across the country by imposing punitive damages based on alleged nationwide patterns of misconduct. Because many of *amici*'s members have nationwide operations, those members can be, and have been, subject to

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* The parties have consented to the submission of this brief through letters filed with the Clerk of the Court. Counsel for *amici* authored this brief in its entirety, and no person or entity other than *amici* and their members has made a monetary contribution to the preparation or submission of this brief.

punitive damages claims based on theories of this sort. As the facts of this case demonstrate, such theories subject defendants to massive and arbitrary damages awards. The threat of such awards deters companies from engaging in nationwide practices that achieve economies of scale and other efficiencies needed to provide special benefits to consumers and maintain uniform quality across their operations. Because juries that impose punitive damages based on evidence of alleged nationwide patterns of misconduct are regulating conduct outside of their States in direct contravention of the federal structure embodied in the Constitution, *amici* respectfully submit that the use of such evidence is unconstitutional.

SUMMARY OF ARGUMENT

The punitive damages award in this case violates the principles of federalism embodied in the Constitution. Although in recent years this Court has addressed cases in which those principles required invalidation of federal regulation of state conduct, here those same principles require invalidation of a jury award that is in effect one State's regulation of nationwide conduct.

Under traditional principles of sovereignty, each nation or state exercises power over its own territory, and no state has power to regulate conduct within the geographic boundaries of other states. These principles, which first developed in international law, were well accepted in America when our nation was founded and were incorporated into the federalist structure of the Constitution. By doing so, the Framers transformed the territorial limitations on state sovereignty from a matter of comity into a binding obligation. Accordingly, the Court has repeatedly made it clear that the Constitution prohibits state regulation of extraterritorial conduct, regardless of whether the impermissible extraterritorial reach of the state regulation is intended.

In *BMW v. Gore*, 517 U.S. 559 (1996), the Court confirmed that these territorial limitations on state power prohibit States from awarding punitive damages, which are inherently regulatory, for conduct occurring and having its effects in other States. This holding cannot be limited to conduct that is unlawful in those other States. Punishment of extraterritorial conduct impermissibly intrudes on the sovereignty of other States regardless of whether the policies of the two States conflict. Furthermore, given the highly individualized and erratic nature of punitive damages awards, as a practical matter, a jury in one State cannot impose punitive damages based on conduct in another State without intruding upon the policies of that other State.

Although out-of-state conduct may be considered for purposes other than imposing punitive damages, consideration of alleged patterns of nationwide misconduct in connection with punitive damages claims will always, or almost always, violate procedural due process by creating an unacceptable risk of extraterritorial punishment and other unfairness. Certainly in this case, there was an impermissible risk of such punishment because the trial court permitted weeks of testimony concerning out-of-state conduct without any limiting instructions. Moreover, even when such instructions are given, the risk of prejudice is too high because it is unlikely that juries would be able to properly apply multiple punitive damages instructions, because there is a risk that they would be confused or biased by massive evidence of misconduct out of state, and because there is no reliable way to determine that the jury did not use such evidence improperly. Accordingly, due process will always, or almost always, bar consideration of nationwide practices in the assessment of punitive damages.

ARGUMENT

I. THE CONSTITUTION BARS STATES FROM REGULATING CONDUCT OCCURRING AND HAVING ITS EFFECTS WITHIN THE TERRITORIAL BOUNDARIES OF OTHER STATES

The Constitution creates a federal structure with a national government of enumerated powers and co-equal States exercising sovereign powers not ceded to that government. Implicit in this structure are traditional principles of sovereignty placing territorial limitations upon the authority of each State. Although these principles are applied as a matter of comity under international law, they are embedded in the structure of the Constitution and therefore binding upon the States. As a consequence, the Constitution forbids one State from regulating conduct that occurs and has its effects within the geographic territory of another State.

A. Under Traditional Principles Of Sovereignty, One State May Not Regulate Conduct Within The Territory Of Another State

Territorial limits on state power lie at the heart of the principles of sovereignty and comity upon which international law has been based for centuries. Grotius recognized the concept of a state's absolute sovereignty over its territory in the early seventeenth century, *see* Hugo Grotius, *The Law of War and Peace* 207 (photo. reprint 1995) (F. Kelsey trans., Oxford Univ. Press 1925) (1625), and later in that century a group of Dutch jurists, most notably Ulrik Huber, derived from this concept three maxims concerning sovereignty:

> (1) the laws of each state have force within the territory of those states, but not beyond;
>
> (2) a person is subject to a state's laws when he is within the state's territory, whether or not he resides there, and

> (3) a state's laws, as applied within its own territory, are recognized and given force in other states as a matter of comity.

See, e.g., Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 Ill. L. Rev. 199, 200 (1919); *see generally* Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 Am. J. Comp. L. 297, 306 (1953). As Emmerich de Vattel explained in the following century, these principles of sovereignty and comity have a natural law underpinning. Emmerich de Vattel, *The Law of Nations* § 84, at 165 (J. Chitty ed., T. & J.W. Johnson 1852) (1758). ("The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. . . . Other nations ought to respect this right.")

These principles of sovereignty and, in particular, the territorial limitations upon a nation's power reflected in them, were adopted into Anglo-American law. For example, Lord Mansfield relied on Huber in holding that English law would not be applied to regulate a contract for the sale and delivery of tea outside of England's borders. *See, e.g.*, *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775) ("The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him."). Early American jurists also relied heavily on continental scholarship "[i]n ascertaining principles of the law of nations." Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 823 (1989). In fact, Grotius' *The Law of War and Peace* was the second most common title in one survey of colonial libraries, *see Payton v. New York*, 445 U.S. 573, 594 n.36 (1980), and Vattel was "[t]he international jurist most widely cited in the first 50 years after the Revolution," *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978). Thus, the Founding Fathers understood that each state lacks the power to punish even its own citizens for "transgressing within the pale of another." Letter from James Madison to

Edmund Randolph (Mar. 10, 1784), *in* 4 *The Founders' Constitution* 517 (Philip B. Kurland & Ralph Lerner eds., 1987).

In summarizing the "general maxims of international jurisprudence," Justice Story also recognized that principles of state sovereignty place territorial limitations upon a state's power:

> I. The first and most general maxim or proposition is . . . that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. . . .
>
> II. Another maxim, or proposition, is, that no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others.
>
> III. From these two maxims or propositions there flows a third, and that is, that whatever force and obligation the laws of one country have in another, depend solely on the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent. . . .

Joseph Story, *Commentaries on the Conflict of Laws* §§ 18-23, at 21-25 (I. Redfield ed., 6th ed. 1865); *see also id.* § 31, at 31 (noting the "undisputed preference" enjoyed by Huber in the United States). Thus, it has long been settled in this country that a state has exclusive power over its own territory, and no power over the territory of another state, except insofar as the other chooses to allow it.

B. The Territorial Limitations On State Power Imposed By Traditional Principles Of State Sovereignty Are Embedded In The Structure Of The Constitution

The Framers incorporated the territorial limitations on the exercise of state power imposed by traditional principles of state sovereignty into the Constitution and thereby transformed those limitations from principles of comity into binding obligations.

The Full Faith and Credit Clause explicitly embodies the traditional principle of international law that one nation should recognize the laws, judicial decisions, and other sovereign acts of other nations. The Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. This provision reflects traditional principles of international comity. *See Estin v. Estin*, 334 U.S. 541, 546 (1948). Importantly, however, it differs from those principles in one significant aspect. Traditionally, the "comity of nations" depended on each sovereign's sense of justice, desire for reciprocity, and fear of reprisal. *See, e.g.*, Story, *Conflict of Laws* §§ 35, 38, at 32, 34. Accordingly, nothing prevents one nation from refusing to recognize the judgments of other nations. *See, e.g.*, *Hilton v. Guyot*, 159 U.S. 113 (1895). This is not true, however, under the Full Faith and Credit Clause, which "substituted a command for the earlier principles of comity." *Estin*, 334 U.S. at 546. Thus, "[f]or the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity." *Broderick v. Rosner*, 294 U.S. 629, 643 (1935); *accord Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935) ("The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free

to ignore obligations created under the laws or by the judicial proceedings of the others . . . .").

The Full Faith and Credit Clause imposes another form of mandatory comity as well. Under traditional principles of comity, nations not only recognize foreign laws and judgments; they also refrain from applying their own laws to conduct occurring in other nations. *See, e.g.*, *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) (Holmes, J.) ("For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations . . . ."). This principle is also reflected in the Full Faith and Credit Clause. If the States were constitutionally bound to give effect to each other's laws and judgments yet free to prescribe conduct in other States, the Full Faith and Credit Clause would become a vehicle for each State to impose its laws on the others. As such a scheme would be unworkable, the necessary premise underlying the Full Faith and Credit Clause is that each State "can legislate only with reference to its own jurisdiction." *Broderick*, 294 U.S. at 642; *see also* 2 Joseph Story, *Commentaries on the Constitution* § 1313, at 194 (photo. reprint 1994) (M. Bigelow ed., 5th ed. 1891) ("The Constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things *within the territory*.") (emphasis added).

Thus, it is well accepted that a State's laws and judgments, when applied outside the territorial limits of that State, are not entitled to full faith and credit. *See, e.g.*, *Fall v. Eastin*, 215 U.S. 1 (1909) (Washington judgment disposing of real property in Nebraska not recognized); *Tennessee Coal, Iron, & R.R. Co. v. George*, 233 U.S. 354 (1914) (Alabama law forbidding certain suits in other States not recognized). Similarly, a judgment in one State cannot expressly preclude

recovery in another. *See Thomas v. Washington Gas Light*, 448 U.S. 261, 271-72 (1980) ("To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent.").

In addition to being explicitly incorporated into the Constitution under the Full Faith and Credit Clause, traditional principles of state sovereignty are also embedded in the structure of the Constitution. Notwithstanding the Framers' great innovation of shared sovereignty between nation and States, the Constitution preserves the basic relationship among the States as separate and co-equal sovereigns. *See Heath v. Alabama*, 474 U.S. 82, 92 (1985) ("[T]he States are separate sovereigns . . . under the definition of sovereignty which the Court consistently has employed . . . ."); *see also Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (noting "the Constitution's special concern . . . with the autonomy of the individual States within their respective spheres"). This bedrock element of "Our Federalism," though not directly stated in the Constitution, carries the same force as if it had been set forth explicitly in the constitutional text:

> [W]hen the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan — the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning.

Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting); *see also Fed. Maritime Comm'n v. South Carolina*

State Ports Auth., 122 S. Ct. 1864, 1870-71 (2002) (noting that, while certain aspects of sovereign immunity do not appear in the words of the Eleventh Amendment, the principle is given full effect as part of "our Nation's constitutional blueprint," "framework," or "structure"). Accordingly, while international law may not prevent the United States from giving its laws extraterritorial application, *see, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."), it has long been recognized that "[t]he legislative authority of every State must spend its force within the territorial limits of the State." Thomas M. Cooley, *Constitutional Limitations* 127-28 (1868); *see also* David Rorer, *American Inter-State Law* 167 (photo. reprint 1983) (L. Mayer ed. 1879) ("It is a principle universally recognized that laws have no *extra territorial* force.") (emphasis in original).

C. The Territorial Limitations On State Power Embedded In The Constitution Are Strictly Enforced

This Court has enforced consistently the territorial limitations on state power inherent in the Constitution's structure. For example, States are barred from using their criminal laws to punish conduct that occurs and has its direct effects in other States. *See, e.g.*, *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states."). States are also prohibited from enacting civil legislation that regulates conduct in other States. *See, e.g.*, *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another."); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (reversing civil judgment based on prohibition of out-of-state contract). Thus, a State may not regulate conduct in another

State "merely because the welfare and health of its own citizens may be affected when they travel" to that State. *Bigelow v. Virginia*, 421 U.S. 809, 823-24 (1975). Nor may a State prevent its own citizens from taking actions in other States to evade in-state prohibitions. *See id.* at 823-24; *see also Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (barring State from punishing its citizens for entering into out-of-state contract); *Tennessee Coal*, 233 U.S. 354 (invalidating legislation barring suits in other States).

These restrictions apply "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336. Thus, this Court has held that a State may not enact a statute that is designed to control in-state prices but that necessarily regulates out-of-state prices as well, because "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid." *Id.* at 337-38; *accord Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). Certainly, the States have legitimate and even strong interests in these types of regulation. However, to the extent that traditional principles of state sovereignty require "local policy . . . to give way, such is part of the price of our federal system." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) (internal quotation marks omitted).

To be sure, these principles of territorial limitation are not rigid. For example, "the bare fact of the parties being outside the territory, *in a place belonging to no other sovereign*, would not limit the authority of the state, as accepted by civilized theory." *The Hamilton (Old Dominion S.S. Co. v. Gilmore)*, 207 U.S. 398, 403 (1907) (Holmes, J.) (emphasis added). Moreover, the exercise of personal jurisdiction over an individual not geographically present in a State is generally permitted — so long as that individual has adequate contacts with the State and the exercise of personal jurisdiction is not accompanied by extraterritorial application of state regulation.

Thus, American law has evolved from strict prohibition against the assertion of personal jurisdiction over geographically absent persons, *see Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), to recognition that an individual's "minimum contacts" with the forum, even in the absence of actual in-state presence, are sufficient to justify the exercise of judicial power over that individua!, *see Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). However, as this Court has emphasized, the requirement of minimum contacts remains, to a large extent, "a consequence of territorial limitations on the power of the respective States," and thus continues to restrain state power even in situations where the exercise of jurisdiction would not be unfair to the defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

II. A PUNITIVE DAMAGES AWARD IMPOSED UNDER THE LAWS OF ONE STATE FOR CONDUCT IN AND AFFECTING OTHER STATES IS INVALID WHETHER OR NOT THAT CONDUCT WAS ILLEGAL WHERE IT OCCURRED

In *BMW v. Gore*, 517 U.S. 559 (1996), this Court held that a State may not impose punitive damages on a party "for conduct that was lawful where it occurred and that had no impact on [that State] or its residents." *Id.* at 573. Although the Court did not reach the question whether punitive damages may be imposed based upon conduct in another State that is unlawful in that State, *see id.* at 573 n.20, the principles of state sovereignty inherent in the structure of the Constitution dictate that punitive damages cannot be imposed under one State's laws to punish any conduct that occurs and has its effects in another State, whether or not the conduct was unlawful there.

Based upon "principles of state sovereignty and comity," *BMW* recognized that "punitive damages may not be imposed to punish lawful conduct in other States." 517 U.S. at 572. Because punitive damages are intended "to further a State's

legitimate interests in punishing unlawful conduct and deterring its repetition," *id.* at 568, such awards necessarily regulate conduct. *See id.* at 572 & n.17 ("Regulation can be as effectively exerted through an award of damages as through some form of preventive relief.") (internal quotation marks and alteration omitted). Indeed, a law authorizing punitive damages "expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case." *Id.* at 596 (Breyer, J., concurring); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 275 (1984) (Powell, J., dissenting) (punitive damages "are regulatory in nature" and "are no less intrusive than direct legislative acts of the state") (internal quotation marks omitted). However, the power of each State is "constrained by the need to respect the interests of other States" because no single State has the authority to impose "policy for the entire nation, . . . or even impose its own policy choice on neighboring States." *BMW*, 517 U.S. at 571 (footnote omitted). Accordingly, the Court held that in punishing BMW for its lawful conduct in other States, the State of Alabama infringed on the sovereignty of those States. *See id.* at 572-73.

As lower courts have recognized, this holding cannot be limited to conduct that is lawful in the States where it occurred. *See, e.g., Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999); *Ace v. Aetna Life Ins. Co.*, 40 F. Supp. 2d 1125, 1133 (D. Alaska 1999). One State's regulation of conduct in another State is prohibited by the traditional principles of state sovereignty embodied in the structure of the Constitution. *See supra* Section I. Since punitive damages are a form of regulation, it follows that the Constitution prohibits imposition of punitive damages for conduct that occurs and has its direct effects in another State because the exercise of authority to regulate in

another State intrudes upon that State's sovereignty. *See, e.g.*, *Heath*, 474 U.S. at 93 ("A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws.") (emphasis in original); *see also* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Or. L. Rev. 275, 308 (1999) ("When one state imposes punitive damages, using its own substantive and procedural standards for awarding punitive damages, based on the defendant's extraterritorial conduct, that state projects its own regulatory choices regarding punitive damages onto other states.").

In addition, as a practical matter, the imposition of punitive damages by one State for conduct in another State will always or almost always conflict with the policy of that other State. Punitive damages are not a binary option, either permitting or prohibiting something. Instead, they are a uniquely calibrated punishment that reflects a discretionary balancing of factors "on an *ad hoc* and subjective basis." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 46 (1991) (O'Connor, J., dissenting); *see also BMW*, 517 U.S. at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."). Not all States permit punitive damages, and there is "little uniformity among the standards" in the States that do. *Smith v. Wade*, 461 U.S. 30, 60 (1983) (Rehnquist, J., dissenting); *see generally* Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* 337-490 (4th ed. 2000). Consequently, it is unlikely that different juries in different States will reach the same conclusions about the facts of a case, the need for punishment and deterrence based on those facts, and the appropriate amount of money to be awarded to serve those needs. Indeed, recent empirical studies show that punitive damages awards are inherently erratic and subject to geographic biases. *See Amici* Brief of Certain Leading Business Corporations, Section I. Thus, as a practical

matter, a jury's punitive damages award in one State for conduct in another State will inevitably conflict with the award that a jury in that other State would have rendered based on the same conduct. For this reason as well, one State cannot impose punitive damages to punish conduct that occurred in another State without intruding upon the policies, and therefore the sovereignty, of that other State.

III. IN LIGHT OF THE TERRITORIAL LIMITATIONS ON STATE POWER, PROCEDURAL DUE PROCESS BARS CONSIDERATION OF ALLEGED NATIONWIDE PATTERNS OF MISCONDUCT IN PUNITIVE DAMAGES CASES

The territorial limitations that the principles of state sovereignty impose upon state regulation in general, and upon the imposition of punitive damages in particular, do not forbid juries applying one State's laws from all consideration of out-of-state conduct. Out-of-state conduct may, for example, be used to prove knowledge of a particular practice or establish vicarious liability for punitive damages. *See, e.g.*, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 541-44 (1999) (discussing common-law rules governing vicarious liability for punitive awards). Similarly, a jury in one State might impose punitive damages for conduct in another State by applying the laws of the State where that conduct occurred, *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) — provided, of course, that the second State's law delegates the authority to juries in the first State to engage in the regulation inherent in a punitive damages award. However, a jury cannot award punitive damages in light of an alleged pattern of *nationwide* misconduct because, as a practical matter, consideration of such patterns creates an unacceptable risk of extraterritorial punishment and other unfairness.

Certainly, the manner in which respondents were allowed to assert a nationwide pattern of misconduct in the proceedings below failed to provide adequate protection

against punishment of out-of-state conduct. As petitioner details in its brief, respondents' counsel directly asked the jury to hold petitioner accountable for its conduct across the country. In addition, there does not appear to have been any instruction on the laws of any State other than Utah. Nor was there any instruction telling the jury that it could not punish the defendant for the out-of-state incidents paraded before it during the two months of the "institutional" phase of the trial. To the contrary, the trial court rejected such an instruction. R. 7531-32, 7567. As a consequence, nothing prevented the jury below from punishing State Farm for the out-of-state conduct that was presented to it, which would have been quite natural for the jurors to do. Thus, it must be presumed that the jury imposed its $145 million punitive damages award for improper reasons.

Nor, as a practical matter, is it likely that a jury could ever award punitive damages after listening to evidence of a nationwide pattern of misconduct without creating a substantial risk of improper punishment of extraterritorial conduct. First, even if a jury were instructed on how to impose punitive damages under the laws of each State in which part of that pattern occurred, it would be unrealistic to expect the jury to follow such instructions. Juries have difficulty applying punitive damages when only one State's laws are at issue. *See Amici* Brief of Certain Leading Business Corporations, Sections I(B) & (C). They cannot reasonably be expected to accomplish the Herculean task of applying different legal standards to each set of acts underlying alleged patterns of nationwide misconduct. Moreover, there is no reliable way to determine whether a jury has in fact followed its instructions. Under longstanding evidentiary rules, jurors cannot testify about why they reached a verdict, *see, e.g.*, *McDonald v. Pless*, 238 U.S. 264, 267-69 (1915), and *amici* are unaware of any way without such testimony to determine that an award was not based in part on punishment of out-of-state conduct. Thus, while the "idiosyncratic" facts of *BMW*

may have allowed this Court to conclude that the jury's punitive damages award in that case *was* based on out-of-state conduct, *see* 517 U.S. at 610 (Ginsburg, J., dissenting), there is no reliable way to determine that a punitive damages award *was not* intended to punish such conduct.

Consideration of alleged nationwide patterns of misconduct creates other unfairness as well. First, a jury is likely to be confused and even overwhelmed by evidence of nationwide patterns of alleged misconduct. In this case, for example, the jury found State Farm liable for a single refusal to settle third-party bodily injury automobile claims, and then heard testimony regarding alleged nationwide practices from more than forty witnesses, including numerous experts, over the course of a trial that lasted for two months. This testimony covered hail damage in Colorado, independent medical examiners in Hawaii, earthquakes in California, and a verdict in Texas on which judgment was never entered, as well as highly technical issues such as non-original equipment manufacturer automobile parts, appearance allowances, and arbitration procedures, even though none of this evidence was directly related to the handling of the underlying third-party claims against Mr. Campbell. The risk that the jury would lose sight of the properly limited role of such evidence is obvious. Furthermore, even if a jury could keep track of that limited role, there would still be a great risk that the jury would refuse to do so and punish the defendant for its out-of-state misconduct or for being a bad actor. Either way, evidence of alleged nationwide patterns of misconduct creates a great risk of prejudice.

Allegations of nationwide patterns of misconduct also present formidable strategic difficulties for the defense. Especially when the defendant is a large corporation with millions of customers, plaintiffs can often allege many isolated incidents of misconduct, and, as a practical matter, a defendant will not have an opportunity to systematically explain — much less have a full-blown trial on — every incident as to

which a plaintiff alleges wrongdoing. Moreover, it is hard to put isolated incidents of misconduct into perspective for jurors, who can easily lose sight of — or fail altogether to appreciate — the fact that there are many thousands of daily transactions between a corporation with nationwide operations and its customers, employees and other parties. Thus, defendants are hamstrung in defending against allegations of nationwide patterns of misconduct.

For all these reasons, the use of nationwide patterns of misconduct in imposing punitive damages will almost always violate due process. As this Court has held, procedural due process requires that a jury's discretion to impose punitive damages be "exercised within reasonable constraints." *Pac. Mut. Life Ins.*, 499 U.S. at 20. Because evidence of nationwide patterns of misconduct presents a high risk of prejudice and confusion, places defendants at a strategic disadvantage, and is not amenable to meaningful review, due process forbids the use of such evidence.

Nor does the ability of judges to consider uncharged conduct in sentencing suggest otherwise. As the Court has emphasized, a judge's ability to punish a criminal defendant for such conduct is foreclosed by statutory maximum penalties:

> We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. As in *Williams*, our periodic recognition of judges' broad discretion in sentencing — since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range — has been regularly

> accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature.

Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (emphasis in original) (internal citations omitted); *accord Williams v. New York*, 337 U.S. 241, 244-45 (1949) ("*Within limits fixed by statutes*, New York judges are given a broad discretion to decide the type and extent of punishment for fixed sentences.") (emphasis added). In other words, because maximum sentences ensure that consideration of uncharged conduct "cannot swell the penalty above what the law has provided for the acts charged," consideration of such conduct in sentencing "is an entirely different thing from punishing" a defendant for it. 1 J. Bishop, *New Criminal Procedure* § 85, at 54 (4th ed. 1895), *quoted in Apprendi*, 530 U.S. at 519 (Thomas, J., concurring).

There is no analogous protection against the use of out-of-state conduct to punish in the punitive damages context. As *BMW* itself recognized, the "guideposts" for analyzing the excessiveness of a punitive damages verdict do not provide such protection. *See* 517 U.S. at 568. The first and "[p]erhaps the most important" guidepost of reprehensibility, *id.* at 575, does not provide any protection because it is impossible to determine whether a jury has increased an award in order to punish in-state conduct deemed especially reprehensible based on the defendant's alleged activities nationwide, rather than simply to punish out-of-state conduct. Applied in a strict fashion, the second *BMW* guidepost, which examines the ratio between the punitive damages award and the actual or potential damages, might set a maximum penalty and thereby limit punishment to a defendant's in-state conduct only. This Court has held, however, that no "mathematically bright line" can be drawn between constitutional and unconstitutional ratios. *Id.* at 582. Finally, the third guidepost, which looks to the available civil and criminal penalties for the in-state conduct, has not been applied in a strict enough fashion to

impose an effective maximum penalty. As a consequence, the guideposts provide little protection against the threat of improper punishment for out-of-state conduct created by evidence of nationwide patterns. As a consequence, in addition to imposing the limitations reflected by the *BMW* guideposts, due process forbids punitive damages awards based on alleged patterns of nationwide misconduct.

CONCLUSION

For the foregoing reasons, the decision of the Utah Supreme Court should be reversed.

Respectfully submitted,

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